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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1309

CORN PRODUCTS REFINING COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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Statement

Appellees' motion to affirm, filed pursuant to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, was received by appellant on April 14, 1947.

It is submitted that appellant's jurisdictional statement which sets forth the principal issues involved and the grounds upon which it is contended that the questions presented are substantial, should demonstrate that the motion to affirm should be denied or at least that action thereon should be deferred until after briefs, argument and consideration of the case on appeal. However, some further amplification may be helpful to the Court and, therefore, pursuant to the permission accorded by paragraph 3 of Rule 12 and paragraph 3 of

Rule 7 of the Revised Rules of the Supreme Court, this brief is filed in opposition to the motion to affirm.

The Case

Appellant brought this suit seeking a review of and a decree setting aside, annulling and enjoining enforcement of an order of the Interstate Commerce Commission.

The proceeding before the Commission involved the switching of cars by railroads, respondents in the investigation, to and from points of loading and unloading in appellant's plant at Argo, which is within the terminal and switching district of Chicago.

The line-haul rates charged for transportation to and from appellant's plant are the Chicago rates; namely, the same rates which are charged for the transportation of similar freight to and from all team tracks, termini and industries within the Chicago terminal area. Appellant's plant was constructed and began operations in 1910. Continuously from that time the railroads have performed the spotting of cars at points of loading and unloading in the plant at their line-haul rates without added charge, the Chicago line-haul rates being regarded by them and by appellant as covering this service and including compensation therefor.

Following its basic report in *Propriety of Operating Practices—Terminal Services,* Ex Parte 104, Part II, 209 I. C. C. 11, in which it announced certain general rules or standards to be employed in determining the extent of carriers' obligations under and the services for which they are compensated by their line-haul rates, the Commission in 1931 and 1932, in one of its supplementary proceedings, held hearings and received evidence with regard to switching at appellant's plant. The Commission evidently determined that the line-haul rates covered the spotting service because it entered no order requiring a change in practices. Thereafter, for eleven years, the situation continued as it had been from the opening of the plant. However, in 1943 the Commission suddenly announced further

hearings. Following these hearings it made a report in which, despite the years of contrary practice and its own previous action, it held that the railroads were not compensated by their line-haul rates for spotting cars and that, although they performed the service, the transportation covered by their line-haul rates did not extend beyond certain tracks in appellant's plant enclosure and certain other tracks in a railroad yard entirely outside the plant. On appellant's petition for reconsideration, a further hearing was had in 1945, after which the Commission affirmed its prior decision and made the order attacked in this suit.

The order would require the railroads to cease from the services performed by them for over 35 years and would prohibit them from switching cars beyond the points designated by the Commission unless an added charge should be paid to them for so doing. It is estimated that the additional charges would amount to several hundred thousand dollars annually, not demanded of any other industry, large or small, in the Chicago terminal area where the railroads perform the switching.

Without recounting at this time all that transpired at the hearings before the Commission, the record in which will be before the Court, it is sufficient to say that both investigators for the Commission and witnesses for the railroads testified that the switching at appellant's plant was and had always been performed by the railroads; that it was done efficiently and economically from a railroad standpoint; that there were no material interferences with the railroads' performance of the operations at their own operating convenience; that in switching cars the railroads were not controlled or directed by appellant or prevented by conditions in its plant from spotting cars at their own railroad operating convenience; and that the line-haul rates were intended to compensate the railroads for the spotting service.

At these hearings further evidence was offered both by appellant and respondent railroads which the Commission refused to receive and consider, which would have shown, in substance:

(a) That the practices at appellant's plant as to switching and charges were in all respects similar to those, not at a few competing plants, but at every other industry, large and small, in the Chicago area where the railroads perform the switching; that at every industrial plant in Chicago where the railroads do the switching the Chicago line-haul rates were treated as covering the service of spotting cars and as including compensation therefor to the railroads; that at no industry in the Chicago area where the railroads perform the service was a charge therefor made in addition to the line-haul rates; that the Chicago rates were constructed with this very idea in view; that the cost of switching at appellant's plant was examined and taken into account in arriving at the rates; that the same situation obtained at all industries in all other large terminal areas where the railroads performed spotting; "that throughout the country it is the general practice that the line-haul rate includes, without additional charge, the placing or spotting of cars at points of unloading, or the removal of cars for [from] points of loading at industry tracks, and that the general practice is to make no additional charge in addition to the line-haul rates for that service, and that this is so regardless of the amount, quantum or cost of the particular service of spotting or placing cars, the size of the industry involved, the number of tracks used by the industry, regardless of the number of cars placed or spotted, and also regardless of whether the track is an industry track or a team track, the sole exception being when the industry itself, for reasons of its own, elects to perform its own switching and spotting rather than permit the railroads to do so"; and that to require the railroads to make an additional charge for switching at appellant's plant or compel them to discontinue service beyond railroad yards outside the plant or designated points within the plant would impose upon appellant charges not paid by any other shippers or industries paying the same rates and would deny to appellant

services customarily afforded to all other industries and shippers, large and small, including those located in the Chicago area and paying the same line-haul charges.

(b) That the services involved in switching cars to and from points of loading and unloading in appellant's plant were less and involved less interference than the switching of cars to and from team tracks and other industries, large and small, in the Chicago terminal area subject to the same line-haul freight rates.

The refusal of the Commission to receive and consider this evidence constitutes one of the grounds of attack upon the order.

Another question arises because the Commission in its report and as the basis of its order made findings not supported, as appellant claims, by any evidence which was received but which, instead, were in direct conflict with and in complete disregard of uncontradicted evidence of informed witnesses whose competence was not challenged. For their testimony the Commission substituted its own impressions without support in the evidence but based upon what the presiding Commissioner referred to as the Commission's "informed experience".

On both of these points the lower court ruled that the Commission's action was sustained by the decisions of this Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, and other decisions involving orders of the Commission in investigations as to switching at other industrial plants and particularly the payment of allowances by the railroads to industries where the railroads were not permitted by the industries to do the switching beyond certain interchange tracks, a situation unlike that at appellant's plant and most industries.

Another ground of appellant's attack upon the Commission's order involved a matter which was not claimed by appellees to have any relation to the decisions cited. This arose from the fact that during the pendency of the present

proceeding before the Commission the railroads filed a new tariff schedule, for the first time specifying with considerable particularity the circumstances under which charges in addition to their line-haul rates would be made in connection with the switching of cars at industrial plants. The effect was that except in the circumstances specified in the schedule no charges in addition to the line-haul rates should be made. By its terms this tariff, referred to here as the Raasch tariff, was made applicable to switching at appellant's plant. The Commission allowed the tariff to go into effect. The appellant argued that it disposed of the matter under investigation because by its provisions the extent of the terminal services covered by the line-haul rates was no longer a matter of inference or for determination by the Commission on the basis of the standards previously employed, since after the tariff became effective additional charges could lawfully be collected only in accordance with and under the conditions specified in the tariff. The Commission, however, although finding that the tariff was applicable at appellant's plant and although its provisions were not found to be unreasonable or otherwise unlawful, ruled that the tariff was inoperative at appellant's plant, apparently because its provisions were contrary to the views of the Commission as to the circumstances under which additional charges should be made.

The lower court upheld the Commission's action without opinion, merely adopting its conclusion.

The Major Issues Presented by the Appeal

There are, therefore, three major issues presented by the appeal. Following the order of the argument in support of the motion to affirm, these questions may be restated as follows:

1. Whether the Commission erred, acted arbitrarily and unlawfully and denied a fair hearing in refusing to receive and consider a large amount of evidence offered by appellant and the railroads, and whether the lower court erred in upholding the Com-

mission in this respect. This general question is to be divided into three parts:

(a) Whether because this Court in *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402, and allied cases, upheld orders of the Commission in various proceedings directing the railroads to cease paying allowances to industries doing their own switching,* and because, in the course of its opinion it stated that it did not appear from the evidence then before it that there was a custom or practice that the railroads' obligation under the line-haul rates included the service of spotting cars, the Commission may forever thereafter in other proceedings involving other industries and other rates refuse to accept evidence proving that such a custom or practice actually does exist where the railroads themselves perform the switching. Accepting the evidence tendered in this proceeding as true (and the correctness of the facts sought to be proved thereby has not been challenged), the real question is whether under the circumstances stated an assumption contrary to the real facts is to be forever perpetuated so that it may be invoked against an industry where the railroads have always, under their line-haul rates, switched cars to and from points of loading and unloading.

(b) Whether in applying one of the standards announced by the Commission in its basic report,

* In all of the cases, with one exception, which came before this Court, the railroads paid or had paid allowances to shippers, doing their own switching, as distinguished from the situation at appellant's plant where from its inception the railroads have always performed the spotting of cars with their own power and crews and at the line-haul rates. In the single exception, *Weirton Steel Company Terminal Allowance*, 209 I. C. C. 445, the Commission's report indicates that the industry had its own locomotives and did a part of the switching and the industry agreed that it would not meet its needs to have the spotting performed by the railroad on a regular schedule, facts which are not present here.

209 I. C. C. 11, for determining whether the switching service at a particular industry is included within the railroads' obligation under their line-haul rates and is compensated for thereby, namely, whether the service is in excess of "team track delivery or simple switch placement", the Commission may refuse evidence as to the service which constitutes team track delivery and simple switch placement under the particular rates paid by the industry.

(c) Whether when the issue is as to the extent of the service contemplated by and for which the railroads are compensated by the line-haul rates the Commission may refuse evidence that the cost of the switching service in question was computed for the purpose of and was considered in fixing the rates charged.

2. Whether in the face of affirmative and uncontradicted evidence by competent witnesses, including the Commission's own investigators called as witnesses by its counsel, (a) that there are no material interferences by the industry or by conditions in its plant with the switching of cars by the railroads at their railroad operating convenience; (b) that the industry does not direct or control the performance of switching by the railroads or dictate the time and manner in which switching shall be conducted; and (c) that the line-haul freight rates were intended to and do include compensation to the railroads for the switching of cars to and from points of unloading and loading, the Commission, without contrary testimony and solely on the basis of its "informed experience" and an examination by it of blueprints, may make directly contrary findings.

3. Whether the Commission may treat as wholly inoperative and not binding upon the railroads or the appellant a tariff schedule which by its terms is ap-

plicable at appellant's plant and defines the circumstances under which charges in addition to the line-haul rates will be made in connection with the switching of cars, which shedule has not been ordered cancelled or held to be unreasonable or discriminatory or otherwise in violation of the Act.

It is believed that these questions are of sufficient substance so that the Court should not affirm forthwith, but should hear argument thereon, receive briefs and examine the record. In case further demonstration of the substantial nature of the issues is needed, the following argument is submitted.

Argument

Rule 7, paragraph 4 of the Revised Rules of this Court, provides that

> "The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

It is not suggested, nor could it be, that this appeal was taken for delay.

Appellees' argument is in effect that the issues presented by the appeal have been settled by prior decisions which leave no questions here of fact or law, so that justice will be done by affirmance of the judgment below simply upon the authority of such prior decisions. It is submitted that such is not the situation.

POINT I

On the first major question, whether the Commission erred in refusing to receive and consider evidence and denied a full and fair hearing, the decisions of this Court in the *Tin Plate* and allied cases do not afford authority for affirmance of the judgment below without consideration of the record, briefs and argument.

Appellees' main argument in support of their motion to affirm is that this Court's decisions in *United States* v. *Am. Tin Plate Co.*, 301 U. S. 402, *United States* v. *Pan American Petroleum Corp.*, 304 U. S. 156, *Inland Steel Co.* v. *United States*, 306 U. S. 153, *United States* v. *Wabash Railroad Co.*, 321 U. S. 403 and allied cases did not leave open thereafter as issues of fact subject to proof, the questions to which the evidence offered and excluded by the Commission was addressed, and that these decisions sus-

tain the Commission's action in refusing to receive and consider the proof which was tendered and excluded. It is submitted that the decisions do not have, and in the interest of justice and reality should not be held to have, the effect claimed for them.

A. As to the exclusion of evidence to show custom and the practices of the carriers under the particular line-haul rates involved.

The decisions relied upon by appellees cannot afford precedent justifying affirmance of the judgment below forthwith and without argument and consideration of the record unless approval by this Court of the Commission's decisions and orders there under review established, as a matter of law, which could never thereafter be controverted by proof of facts, the proposition that by practice or custom the line-haul rates for transportation to and from Chicago do not include compensation to the railroads for switching cars to and from points of unloading and loading at industrial plants in the Chicago terminal area, where the railroads perform and always have performed this service, and that the railroads' undertaking under these rates does not embrace such service.

That to give these decisions such effect would be wrong is forcefully demonstrated in this proceeding, because if the evidence which appellant sought, and was not permitted, to present was correct, it would mean perpetuating as an uncontrovertible proposition or presumption something which is contrary to the real facts. For, as has been stated, the evidence offered by appellant included the testimony of railroad witnesses and the testimony of a recognized expert in the transportation field, who had made a study of the facts with regard to the practices of the railroads, whose competence and credibility were not challenged in any respect, that a general and, indeed, universal practice exists that under the Chicago rates without added charge the railroads have always performed the spotting of cars at all industries, large and small, where they do the switch-

ing as they do at appellant's plant, that the line-haul rates were designed to include this service, and that a similar practice exists at other terminal areas throughout the country. At no time during the course of the proceedings before the Commission or of the proceedings in this suit has it been suggested by appellees that the real facts were otherwise than as would have been disclosed by the evidence which was excluded.

Counsel for appellees, in urging their motion to affirm, are, therefore, in the position of arguing that because in earlier cases the Commission was upheld in concluding that proof had not there been presented to sustain a finding that the particular line-haul rates involved included compensation for spotting where the industries performed the service, in whole or in part, future cases must be decided on the assumption, contrary to evidence which is available and presented, that all rates are treated by the railroads, as a matter of practice and custom, as not including compensation for spotting service when performed by the railroads, and that there is no practice or custom pursuant to which the railroads, under rates such as those for transportation to and from Chicago, spot all cars at all industries where they perform the work at the line-haul rates without additional charge. We do not believe that the decisions sustain, or that this Court intended them to be used to perpetuate, a fiction in the face of available evidence.

In the *Tin Plate* case, the Court said (pp. 409-410):

> "It is asserted by the appellees that it has become customary to do this spotting on plant tracks as part of the delivery service which the carrier holds itself out as agreeing to perform without a charge additional to the line-haul rate. The record fails to establish any such custom."

Thereafter, in its opinion, in discussing the practices of the carriers in paying allowances, the Court said:

"There is no custom or practice which has the force of a rule of law that the line-haul rate includes plant spotting service."

Appellees argue that these expressions justify the refusal of the Commission in this proceeding to receive the evidence described. Plainly, however, this Court was there treating the issues as questions of fact and stating only its conclusion upon the records in those proceedings.

Here appellant endeavored but was not allowed by the Commission to create a record of evidence which would overcome the very deficiency which the Court noted in the evidence in the *Tin Plate* case, and would establish the existence of such a custom or practice in the Chicago terminal area and under the Chicago line-haul rates which are charged on shipments to and from appellant's plant. The proffered evidence, as has been said, would have shown that at every industry, large and small, within the Chicago terminal area where the railroads perform the spotting, it is and always has been the practice and custom of the railroads to switch cars to and from points of loading and unloading at the line-haul rates and to treat those rates as covering and including compensation for the service.

The *Pan-American Corporation* case involved orders of the Commission requiring carriers to cease and desist from paying allowances to the industries which were doing their own switching. There was present no question as to whether the line-haul rates included compensation for spotting when performed by the railroads themselves. The Court held simply that it was of the opinion that there was substantial evidence to support the Commission's findings. Certainly this does not mean that in other proceedings parties may not introduce evidence which might lead to contrary findings. Indeed, the fact that the Court took jurisdiction to hear the case and review the record lends support to appellant's contention that it is entitled to have a similar review here.

The *Inland Steel Company* case was likewise an allowance case. The Commission had found in that case that the industry "was performing this plant service for its own convenience", that under the circumstances the service was one which the railroad was under no obligation to perform, and that consequently the allowance paid to the industry by the railroad was unlawful because "the allowance was paid for service for which the railroad was not compensated under line-haul rates" (page 154). This case is certainly not a precedent for excluding evidence designed to show that the service performed at appellant's plant is a service for which the line-haul rates provide compensation to the railroads or for upholding an order of the Commission made in disregard of uncontradicted evidence to this effect.

United States v. *Wabash R. Co.*, 321 U. S. 403 (the *Staley* case), likewise affords no support for appellees' motion but, on the contrary, presents strong reasons for the Court to entertain the appeal and consider this case on its merits. Unlike the situation in the present case, the Staley Company had previously done its own switching between an interchange track and points of loading and unloading and had received an allowance from the railroads. The Commission ordered the railroads to cease paying the allowance. The railroads then took over the switching and made an extra charge therefor, thus treating the particular line-haul rates there involved as not covering the service. The case came before this Court for review of an order of the Commission declining to permit the railroads thereafter to discontinue the collection of this additional charge.

It is recognized by appellant that the decision in the *Wabash* case, which was announced after the 1943 hearings before the Commission in regard to switching at appellant's plant, sustains the Commission's action in excluding certain evidence which was offered by appellant to support the contention that since the railroads switched cars to and from points of loading and unloading in the plants of several of appellant's competitors without making any charge in addition to the line-haul rates, an order of the Commission requiring this appellant to pay an added charge would be

invalid because it would discriminate against it and in favor of such competitors. But the evidence, whose exclusion is here alleged to have been erroneous, is of a different sort and was addressed to a different and broader issue, namely, the basic question whether by custom or practice or definite intention the line-haul rates to and from Chicago include compensation for spotting cars at all industries, including appellant's plant, within the Chicago terminal area where the railroads perform the service. On this point the decision in the *Wabash* case sustains appellant's position. This is clear from the Court's opinion and its approval of the standards or tests laid down by the Commission in its basic decision, 209 I. C. C. 11, for determining the services which are covered by the line-haul rates of the railroads and the performance of which, without added charge, is therefore in accordance with Section 6 of the Act. The Court stressed that the question as to the point at which a carrier's transportation service under its line-haul rates begins and ends is a question of fact (p. 408). One of the tests stated by the Commission is whether the "form of delivery is customary" (209 I. C. C., p. 18). Since this is a question of fact, it is obviously one to be decided in accordance with evidence, and evidence as to what is customary and as to the usual practice of the railroads under the rates involved is not only relevant but necessary.

It is difficult to imagine evidence more directly addressed to this issue and bearing more convincingly upon the question whether rates include compensation for switching service, especially realizing that the rates involved are the line-haul rates to and from Chicago, than proof that at every industry in the Chicago terminal area, large and small, including industries larger than appellant's, with greater opportunities for interferences and costly switching, where the railroads themselves perform the switching to and from points of loading and unloading, the Chicago line-haul rates are treated as including compensation therefor because the service is performed at those rates without additional charge. Less directly related but equally relevant on the

question of general custom and practice and as showing that the practices at Chicago and the undertakings and obligations contemplated by the Chicago rates were not unusual but were in conformity with the general rate structure of the country, was the tendered proof that at every important terminal area, where there were large as well as small industries, the railroads, where they performed and always had performed the switching of cars to and from points of loading and unloading, as they always have at appellant's plant, do so at the line-haul rates without added charge; and the further evidence that it was one of the basic theories of the rate structure of the country that where the railroads themselves perform terminal services, the rates should include compensation for all service to and from points of loading and unloading, regardless of the nature and extent of the particular terminal operations involved. Such evidence is far different from evidence designed to show discrimination as between individual plants which this Court in the *Wabash* case held to be irrelevant.

It is one thing to hold that a shipper or industry receiving an allowance or a service not accorded to shippers generally and therefore not covered by the line-haul rates paid may not assert, as a defense to an order requiring the railroads to conform their practices to their line-haul rate tariffs, that some other and competing shipper or industry is receiving a like preference. It is quite another thing, however, to hold that the Commission may refuse to receive evidence as to what the services are which are customarily rendered to *all* shippers and industries under the line-haul rates involved.

In the present case, counsel for appellees, in opposing deferment of the Commission's order, represented to the lower court that the order was intended to prevent appellant from continuing to receive "a preferential service not accorded to shippers generally." The quoted language was used by this Court in its opinion in the *Wabash* case. The very purpose of the evidence offered by appellant and the railroads and rejected by the Commission was, how-

ever, to show that the service which appellant was receiving was NOT "a preferential service not accorded to shippers generally" but, instead, was a service similar to that accorded to shippers generally paying the same rates and, indeed, less than that accorded to many. It is hard to believe that it was the intention of this Court to afford precedent which would sustain the Commission in refusing to receive evidence that similar or greater services were accorded by the railroads under their line-haul rates to shippers generally and then, having excluded such evidence, in finding that the services accorded to appellant were in excess of services accorded to shippers generally.

Finally, it may be remarked that when appellees assert that this is "merely another of these supplemental proceedings in Ex Parte 104", they fail to tell the Court that in 1932 and 1933 in this supplemental proceeding the Commission investigated and took testimony regarding the spotting of cars at appellant's plant, which evidence showed that since the construction of the plant in 1910 the railroads had performed the spotting at the line-haul rates without additional charge and the Commission evidently then concluded that no violation of the Act was shown and that the line-haul rates included the switching service. And appellees fail to tell the Court further that the evidence at the further hearings in 1943 and 1945 indicated no change in the practices or conditions at appellant's plant from those shown eleven years before.

It is submitted, therefore, that the decisions relied upon by appellees do not afford controlling precedent clearly justifying the Commission's action in excluding the evidence offered and do not leave the question raised by the appeal which is here discussed "so unsubstantial as not to need further argument" (Rule 7, paragraph 4). And if some of the language in the opinion in the *Wabash* case or in one of the other cases may appear to lend support to the interpretation of this Court's decisions placed thereon by appellees and by the Commission, the present appeal affords an opportunity to the Court to clarify the situation.

For with all respect, it is submitted that it is neither sound nor in the broad public interest that decisions of this Court may be interpreted as perpetuating for all time and as the basis for any future proceeding which the Commission may see fit to institute with respect to an individual industry, an assumption contrary to the real facts without opportunity to present evidence as to what the practices and nature of the rate structure of the railroads really are.

B. As to the Commission's refusal to receive evidence concerning team track and industry switching in the Chicago terminal area under the Chicago rates.

In its basic report (209 I. C. C. 11) the Commission stated as one of the important tests for determining the extent of service embraced within the obligation of the railroads under, and compensated for by their line-haul rates, whether the particular service is or is not in excess of "team track delivery or simple switch placement". The line-haul rates here involved were the Chicago rates and in order to give the Commission an evidentiary basis for the application of this test and for the determination of what was plainly a question of fact, appellant and the railroads offered to show the nature of and the services which were involved in "team track delivery or simple switch placement" under the Chicago line-haul rates. The Commission refused to receive this evidence. Appellees argue that here again prior decisions of this Court excused the Commission for its refusal. In a footnote an attempt is made to state what is meant by the terms "simple switch delivery" and "team track delivery", as though team track delivery were a standard term describing the same thing in Chicago as at a rural station. But plainly this is not so. What team track delivery and simple switch placement are in a large terminal area and what they are at a small station are, in each instance, questions of fact susceptible of proof, especially when particular line-haul rates are involved. And it is believed that the matter was so regarded by this Court.

In concluding its opinion in the *Tin Plate* case, the Court, while saying that "The Commission properly held that each case must be decided upon the circumstances disclosed" (page 411), went on to say that in each of the cases under review "the Commission found, *upon sufficient evidence*", that the service involved in spotting cars at points of loading or unloading within the several industries "called for excessive service greater than that involved in team track spotting or spotting on an ordinary industrial siding or spur". The Court then remarked that it was unable "to say that the findings in respect of the individual plants lack support in the evidence" and that, therefore, the Court was "bound to accept them and to hold the orders lawful" (page 411). This is certainly far from a decision that in an individual case the Commission may refuse to receive evidence as to the service involved "in team track spotting or spotting on an ordinary industrial siding or spur" in the terminal area in which an industry is located under line-haul rates paid by the industry involved, and then on the basis of its privately held conception of what team track delivery or simple industry switching is, may decide that the spotting of cars at the industry is in excess thereof.

Again, in the opinion in the *Wabash* case, the Court said that "the point in time and space at which a carrier's transportation service ends is a question of fact" (page 408), and that the Commission's "findings on that question will not be disturbed by the courts if supported by evidence" (page 408). But it certainly did not hold that the Commission could refuse to receive evidence and then make a valid finding based on its "informed experience" without evidence relevant to a determination of the factual question.

Under the circumstances, it is submitted that on both phases of the first major question raised by the appeal, the Commission's order and the judgment of the lower court upholding it cannot properly be affirmed simply upon the authority of the previous decisions cited in appellees' motion, and that, therefore, the case is one calling for consideration of the appeal by this Court upon the merits.

POINT II

The question whether the Commission decided arbitrarily and contrary to credible and uncontradicted evidence calls for consideration on the merits.

Even if, on some theory, the decisions of this Court relied upon by appellees had the effect of converting issues of fact into either conclusive and indisputable presumptions (contrary to the real facts) or into propositions of law, so that the evidence which was offered and which the Commission refused to receive and consider was properly excluded because addressed to an issue no longer open, nevertheless there remain for decision on this appeal the two other major questions previously described. As to these certainly the cases cited do not afford controlling authority for affirmance without consideration on the merits.

One of these questions is whether the Commission's findings and conclusions were, as appellant alleges, without support in the evidence which was received and were arbitrary and unlawful because contrary to and in disregard of uncontradicted evidence of competent and credible witnesses. These are issues which can only be determined, in fairness to appellant, upon a consideration of the record and after brief and argument upon the merits. Certainly the statements in appellees' motion as to the Commission's findings and the alleged support therefor in the record should not be accepted without an examination of the record itself. Appellant challenges these statements, but extended discussion thereof would involve argument on the merits and upon the record which is not appropriate at this time.

It is sufficient here to say that this question arises in connection with the Commission's apparent application here of the test referred to by this Court in the *Wabash* case (p. 407) that the line of demarcation of the service covered by the line-haul rates should be drawn

"at the point where the carrier is prevented from performing at its ordinary operating convenience any further service, by the nature, desires, or disabilities of a plant".

Whether this is an appropriate test in a case such as the present as distinguished from an allowance case is a question which need not be argued now. Here the railroads perform the entire service of switching to and from points of unloading and loading. Whether they do so at their "ordinary operating convenience" or the point, if any, at which they are prevented from so doing are certainly questions of fact. And being questions of fact, if the right to a hearing is to be preserved, they may be decided only in accordance with the evidence produced at the hearings.

Appellant alleges that the Commission did not decide in accordance with the evidence, that it completely ignored uncontradicted evidence and made findings contrary thereto. Whether or not it did so certainly presents a substantial question which should not be decided without examination of the record, receiving briefs and hearing argument.

In their motion, appellees assert (page 7) that appellant's contention "resolves itself into a quarrel with the Commission concerning not the lack of facts or the absence of substantial evidence, but the weight to be given and conclusions to be drawn from competent and undisputed evidence which the record does contain." This is a strange characterization of appellant's contention, as the following few examples will indicate.

Thus, one of the Commission's own investigators testified that he had found no restrictions on the hours when switching could be done by the railroad (R. 587).* The railroad's superintendent testified that appellant had issued no instructions and placed no limitations upon the railroads as to the times for switching cars (R. 50). The rail-

* Figures preceded by "R" refer to pages of the stenographic minutes of the hearing before the Commission which are in the record herein.

road's superintendent testified also that the desires of appellant did not prevent the railroad "from spotting cars or removing cars or conducting your switching operations to and from the Corn Products plant in the manner in which your railroad as a railroad would like to do" (R. 1380). Again a witness for appellant testified that there was no instruction from appellant that prevented the railroads from switching cars in appellant's plant at their convenience (R. 106). There was other testimony all to the same effect with no contradiction whatever. The Commission, however, found that appellant issues orders "when to spot cars" (Petition p. 76) and that the railroad "is not at liberty to move any of them [cars] to loading and unloading points until told to do so by the industry". If the Commission makes a finding directly contrary to the undisputed evidence, can it fairly be said that challenging that finding is quarreling with the weight to be given to the "undisputed evidence."

Again the Commission found and predicated its decision in large part upon its finding of various "interruptions or interferences encountered in the switching operations" (Petition p. 75). The evidence on the question of interruption and interference included testimony of one of the Commission's investigators that "the switching was done promptly and efficiently" (R. 631); testimony of another of the Commission's investigators that he had nothing to offer criticizing the operation from a railroad standpoint (R. 660); testimony by another that the lifting of certain bridges which the Commission found to constitute interference actually interfered "very little" with the railroad operations (R. 632); testimony by the operating superintendent of the railroad that such minor delays as there were, were not serious and that he, himself, from a railroad standpoint had nothing to criticize in the operation (R. 1345). Between the hearing before the Commission in 1943 and the further hearing in 1945, the evidence shows that all of the delays caused by bridges and by other factors, cited and magnified by the Commission in its first report, had been eliminated and in 1945 the superintendent of the

railroad testified "I would say with the operation as it is now there is no interference" (R. 80-81). There was other evidence to the same effect. None of this evidence was in any way contradicted. Nevertheless the Commission found and based its decision upon a finding that conditions in the plant interfered with the railroads performing switching at their operating convenience. As indicated in the appellees' argument in support of the motion to affirm, it is plain that the Commission did this only by disregarding the testimony of its own investigators and of competent and informed railroad witnesses having charge of the operations, and by substituting ideas derived from looking at "a large blueprint showing in detail appellant's plant buildings, facilities and its extensive system of interlacing track" (Motion page 8). The Commission was thus, as the presiding Commissioner indicated during the hearing, basing its decision, not upon the uncontradicted evidence of competent witnesses but upon its "informed experience".

To challenge such findings by the Commission is certainly not to be characterized as mere quarreling with the weight given by the Commission to "undisputed evidence". It is a novel and dangerous conception of the authority of an administrative agency that its function of weighing the evidence entitles it to disregard evidence and make findings directly in conflict with uncontradicted testimony before it, because, in its "informed experience", it thinks it knows better than the witnesses.

Certainly with such challenges here to the Commission's order and to the decision of the court below sustaining it, this Court should not affirm the judgment below without considering the record and hearing the case on the merits.

POINT III

The question as to the effect or non-effect of the Raasch Tariff raises a novel and important issue which should be considered.

The third major question, whether the Commission erred in denying effect to a filed tariff schedule which has not been found to be unlawful or ordered cancelled but is in effect and applicable at appellant's plant, is a question for which previous decisions under Ex Parte 104 obviously afford no precedent. The Commission's decision on this point flies in the face of consistently held views as to the effect of tariffs. This is fully stated by Commissioner Alldredge in his dissenting report. It is a contention supported by decisions of this Court cited therein, including *Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516.

In support of their argument, appellees cite *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 511. But this decision, far from upholding the action of the Commission here and supporting appellees' contention that it should be forthwith affirmed, supports the position urged by appellant. For that case did not involve a decision by the Commission that a tariff on file, uncancelled and in effect, could for any reason be disregarded. The Commission there had ordered the particular tariff cancelled because in violation of the Act and the issue before the Court was as to the validity of its order. It was as though the Commission here had ordered the Raasch tariff cancelled. If that had occurred, a different problem would be present. But the Raasch tariff was not even under investigation pursuant to any order of inquiry by the Commission and the Commission did not find the tariff unreasonable or order it cancelled. It merely elected to ignore it. But a filed tariff has the effect of a statute which even the Commission may not ignore so long as it is allowed to stand.

CONCLUSION

The motion to affirm should be denied, or, at least, this Court should defer action thereon until it has considered the record, received briefs and heard argument of the appeal on the merits.

Respectfully submitted,

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